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National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 8(a)(1) 3, 5
Section 8(a)(3) 3
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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 299

BORDEN CABINET CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-17) is reported at 375 F. 2d 891. The Board's decision and order (J.A. 50-75)[1] are reported at 159 NLRB No. 99.

JURISDICTION

The decision of the court of appeals was rendered on April 12, 1967, and a decree was entered on May

[1] "J.A." refers to the Joint Appendix filed in the court below.

1, 1967 (Pet. App. 13, 18). The petition for a writ of certiorari was filed on June 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 29 U.S.C. 160(e).

QUESTION PRESENTED

The Board set aside a representation election (which the union had lost) because of the employer's unfair labor practices, and ordered a new election. The employer committed further unfair labor practices before the second election, which the union again lost and which the Board again set aside. After the second election but before the Board had invalidated it, the union obtained authorization cards from a majority of the employees. The question presented is whether the employer, who did not question the authorization cards, violated the National Labor Relations Act by refusing to bargain with the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the Petition, pp. 20-21.

STATEMENT

A. The Board's findings of fact

On November 20, 1963, pursuant to a petition filed by the International Union of District 50, United Mine Workers of America, the Board conducted a representation election to determine whether the em-

ployees of the petitioner ("Borden") desired the Union as their bargaining representative. The Union lost the election, but the Board set it aside, finding that prior to the election the Company had threatened and discharged numerous employees for engaging in union activities, in violation of Section 8(a)(3) and (1) of the Act. (J.A. 72; *Borden Cabinet Corp.*, 148 NLRB 996.)[2] The Board scheduled a second election for March 5, 1965 (J.A. 72, 52-53; 4).

Several days before the second election, Company Production Manager Fromme approached employee Herman Miller, whose wife had just returned to work from a layoff, and said, "Herman your wife is back to work now * * * how does she feel about the election * * *." When Miller replied that that was her "personal opinion," Fromme stated, "[W]ell, she is back to work now * * * we are having an election coming up in a few days * * * we need every vote we can get * * * tell her to think twice before she votes * * *." (J.A. 72, 53; 14-15.) About the same time, Foreman Seger asked Carol Rockey, one of the employees whom the Company had unlawfully discharged prior to the 1963 election (*supra*), whether her union views had been changed by General Manager Korff's recent anti-union speech. She replied negatively. Shortly thereafter, Production Manager Fromme asked Rockey the same question

[2] The Board subsequently determined that the Company also violated Section 8(a)(4), (3), and (1) of the Act by denying reinstatement to two employees for having testified adversely to the Company in the administrative proceedings relating to the validity of the election (J.A. 72; 61 LRRM 1368).

and, when she gave the same response, he said: "I have nothing against you or your work but I have a job to protect." Korff himself then asked Rockey whether her union views had changed, and, upon receiving a negative reply, declared that he did not want any campaigning during working hours and that he could "get a couple of affidavits saying" Rockey had been engaged in such activity. Korff added that Rockey's work had been better since the Board had ordered her reinstatement, and then stated: "I can't say that for some of the other [reinstated employees] but * * * the [Board's] cease and desist order wouldn't last forever." (J.A. 72-73, 54-55; 3-9.)

Three days before the second election, the Company announced to the employees that there would be substantial increases in their insurance coverage in about six weeks (J.A. 73; 56-57; 33, 39, 41, 84). The day before the election, Manager Fromme told employee Batt that he was considering Batt for the position of foreman, but that "this management job depended on whether or not the Union went in." Fromme added that, if Batt returned to college, the Company might rehire him provided he did not vote for the Union; but that, if the Union got in, the Company would have to lay Batt off since he was one of the employees with the least seniority. (J.A. 11-12; 55.)

The second election was conducted as scheduled, on March 5, 1965, and the Union again lost, by a vote of 128 to 119. The Union filed with the Board objections to the election and unfair labor practice

charges, alleging that the Company's pre-election conduct violated Section 8(a)(1) of the Act and required that the election be set aside. (J.A. 71, 52-53, 59; 77.) At the same time, the Union began soliciting cards from the employees authorizing it to represent them for collective bargaining purposes. By May 20, 1965, 137 out of 248 employees in an admittedly appropriate bargaining unit had signed such cards. (J.A. 65; 9-10, 11, 14, 15, 17-46, 79-84, 85-88, 91-96.)

On that date the Union advised the Company of its majority status, offered to submit its authorization cards to an unbiased check, and requested the Company to commence collective bargaining. The Company refused the Union's request, stating that it had no knowledge of the Union's claim of representation, that the Union had lost the March 5 election, and that the Union's request was untimely. (J.A. 65-66; 88.) The Union then filed a further unfair labor practice charge with the Board, alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. The proceedings on this charge were consolidated with the proceedings arising out of the Company's pre-election conduct.

B. The Decisions of the Board and Court of Appeals

Upon the foregoing facts the Board found that, prior to the second election, the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees respecting their union sympathies, threatening them with economic reprisals for supporting the Union, promising them benefits if they

did not, and announcing increased insurance benefits in a "patent attempt * * * to thwart the holding of a fair election" (J.A. 53, 54, 56, 67, 73). The Board further found that this same conduct "interfere[d] with [the] employees' freedom of choice in selecting a bargaining representative" and thus "warrant-[ed] setting aside the election" (J.A. 67). Finally, the Board held that the Company violated Section 8 (a)(5) of the Act by refusing to recognize and bargain with the Union on and after May 24, 1965. In so ruling, the Board found that the Union had theretofore obtained valid authorization cards from a majority of the employees in an admittedly appropriate unit, and that the Company's pre-election "unfair labor practices, considered in the light of [its] earlier history of union animus and unfair labor practices," established that its refusal was "not because of a good-faith doubt of the Union's majority" but was based on "a rejection of the collective bargaining principle * * * and * * * was in bad faith * * *." (J.A. 73, 65.) The Board set aside the election, and ordered the Company to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and to post appropriate notices (J.A. 68-69, 74-75).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 13-17).

ARGUMENT

The Company does not contest the finding of the Board, sustained by the court below, that immediate-

ly before the March 1965 election it committed extensive unfair labor practices, which precluded the employees from freely voting and required the setting aside of the election. Nor does it deny that shortly after the election the Union obtained valid authorization cards from a majority of the employees in an appropriate unit, and that the Company had no doubt about this fact on May 24, when it refused the Union's request for recognition and bargaining. The Company contends that it was not obligated to bargain with the Union because, in the election conducted 1½ months before, the Union failed to obtain a majority of the votes. In the circumstances of this case, the decision of the court of appeals rejecting this contention is clearly correct, and is not in conflict with any other decision. There is no occasion for further review.

1. As this Court has held, a Board conducted election and certification under Section 9(c) of the Act is not the only means by which a union may establish its majority status and right to recognition. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72. Accordingly, it is well settled that, when a union has obtained valid authorization cards from a majority of the employees in an appropriate bargaining unit, the employer has a duty under Section 8(a)(5) of the Act to recognize and bargain with the union, unless he has a good faith doubt about the union's majority status.[3] *Joy Silk-Mills, Inc.* v.

[3] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with representa-

National Labor Relations Board, 185 F. 2d 732, 741-742 (C.A.D.C.), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179-180 (C.A. 2), certiorari denied, 370 U.S. 919; *National Labor Relations Board* v. *Frank C. Varney Co.*, 359 F. 2d 774 (C.A. 3); *National Labor Relations Board* v. *Frantz and Company*, 361 F. 2d 180 (C.A. 7); *Colson Corp.* v. *National Labor Relations Board*, 347 F. 2d 128, 135-139 (C.A. 8), certiorari denied, 382 U.S. 904; *National Labor Relations Board* v. *Trimfit of California*, 211 F. 2d 206, 209-210 (C.A. 9). Here, as the court below held (Pet. App. 16), "the Company never challenged the validity of the cards obtained by the Union between March 6 and May 20, nor did it express doubt that the cards had been signed by a majority of the unit employees." Rather, the Company's refusal to bargain with the Union on May 24, like its prior course of conduct (see *supra*, pp. 2-4), "was motivated by a desire to frustrate the employees' right to organize and bargain collectively" (Pet. App. 17). In these circumstances, the Board was amply warranted in finding that the Company had violated Section 8(a)

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tives of his employees, subject to the provisions of Section 9(a)." Section 9(a) provides in pertinent part: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining * * *." As this Court pointed out in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, *supra*, 351 U.S. at 66, 74-75, authorization cards constitute sufficient designations within the meaning of Section 9(a).

(5) of the Act, and in requiring it to bargain with the Union.

2. The Company is not aided by Section 9(c)(3) of the Act, which provides: "No election shall be directed in any bargaining unit * * * within which, in the preceding twelve-month period, a valid election shall have been held." First, Section 9(c)(3) merely precludes a second election within twelve months of a prior election; it does not bar a union from establishing its majority status within the twelve months by other means. *Conren, Inc.* v. *National Labor Relations Board*, 368 F. 2d 173 (C.A. 7), certiorari denied, 386 U.S. 974. Second, Section 9(c)(3) is in any event inapplicable here, because it applies only where "a valid election shall have been held" within the twelve-month period. In the present case the March 1965 election was not valid, since the Board set it aside because of the Company's unfair labor practices.[4] It is irrelevant that, at the time the union requested recognition, the Board had not yet invalidated the election. For, as the Board correctly held, the Company's illegal efforts to subvert the election demonstrated that it refused to bargain not because it doubted that the union then represented a

[4] For this reason, the instant case is stronger than *Conren, supra*. In *Conren*, the employer was required to recognize the union on the basis of a card majority established within twelve months of a *valid* election which the union had lost.

As petitioner acknowledges (Pet. 9), there is no "direct conflict" with *Brooks* v. *National Labor Relations Board*, 348 U.S. 96. That case involves a different problem. See the Board's brief in opposition in *Conren*, No. 1029, O.T., 1966, pp. 8-9.

majority of the employees, but because it was unwilling to bargain with the Union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MALCOLM D. SCHULTZ,
Attorney,

National Labor Relations Board.

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